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ABSTRACT

The entire process of legal writing would be shorter and more effective if writers would give as much attention to the politics of the rhetorical situation as they do to legal research. To do that requires the following considerations: (1) understanding the three dramatic elements in the rhetorical situation (audience, purpose, tone); (2) recognizing how these elements apply to the four major categories of legal writing (investigative questioning, objective reporting, analyzing, and persuading); and (3) determining exactly who the audience for each document will be. Each audience--client, opposing attorney, judge, and courts--requires a different approach for effective communication. Communication would occur more regularly if lawyers would ask themselves some pertinent questions before they begin to write: What does this document need to do? What does the audience need from this document? and Does the document directly meet these two needs? (To exemplify what a difference the rhetorical situation makes in the organization and language chosen, two sample factual accounts, one from an office memo and the other from a trial brief, are included and analyzed.) (NKA)

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Kristin R. Woolever

# "The Dramatic Elements of Legal Writing: The Role of Audience"

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Although law school faculty and practicing attorneys have been paying increasing attention to the elements of good legal writing, their emphasis is often in the wrong place. Most faculty who teach law students to write focus on revision as the key to legal drafting. While lawers thoroughly prepare in advance for other aspects of their practice, they often view writing as the one area that affords the luxury of hasty preparation followed by edit upon edit. The bulk of their preliminary work consists of extensive legal research at the expense of paying attention to the politics of the rhetorical situation. The entire process of legal writing can be shorter and more effective if the writer puts more emphasis on the front end rather than the back end of the drafting situation.

To do that requires two considerations: 1) understanding the three dramatic elements in the rhetorical situation, and 2) recognizing how those elements apply to the four major types of legal writing. This presentation discusses both of these preliminary considerations and argues that such preparation is as essential to the writing process as similar preparation is to the oral advocacy process.

I do not mean to collapse all distinctions between oral and written communication, but to follow Lisa Ede and Andrea Lunsford's emphasis on speaking and writing as rhetorical acts

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(CCC, May 1984, 162). The major difference between the two is that in oral communication, the actual audience is addressed, while in written communication the writer must invoke the audience. That means the writer--in this case the legal writer--must analyze the reader/audience before the audience is present in the rhetorical situation. The margin for error is greater because immediate feedback is missing. Walter Ong and Russell Long, in separate studies, suggest that in written discourse the audience is "created fiction." Long goes so far as to say that audience analysis is dangerous because it encourages " noxious stereotyping" on the writer's part. In other words, the lawyer drafting a trial brief invents a stereotypic audience and proceeds in misguided fashion to address that noxious entity.

It's important to realize that first of all the legal writing tradition has put little or no emphasis on analyzing audience, so this is an area that needs to be addressed. Second, the written rhetorical situation includes more than audience analysis in a vacuum. It demands placing that audience in a context including the writer's purpose and the environmental and psychological influences on the entire dramatic situation. For simplicity's sake, I suggest three rhetorical elements in the drama of legal writing:

- o audience
- o purpose
- o tone

Although these three can be argued about and subdivided into elaborate categories, let's keep it simple. Determining the legal document's purpose and analyzing the intended definite

audience allow the writer to better decide on an appropriate tone linking the two, thus encouraging effective communication.

At the level of law students learning legal writing techniques--and unfortunately at the level of many practicing attorneys--the writers view each rhetorical situation (each writing task) as a kind of isolated miracle of communication. The boilerplate format assures the document will communicate in the necessary form. If all the research has been done and packed densely into the appropriate sub-headings, all will be well. These "writers" don't ever pause to consider rhetorical questions such as audience, purpose, and tone. Yet there are definite divisions in legal writing purposes and audiences. It's a step in the right direction to make lawyers aware of the basic categories and the specific writing techniques that increase the likelihood of the miracle of communication occurring.

Legal writing divides into the following four categories defined by their purposes:

| Category | Purpose |
|---|---|
| Investigative Questioning - | To gather information (client interviews, depositions, and interrogatories) |
| Objective Reporting - | To inform lawyers of the facts so they can do further research or make objective decisions (interview summaries, office memorandum fact statement) |
| Analyzing - | To apply law to facts in an objective context. This is a preliminary step to persuading. It's easy to confuse analysis and persuasive argument |

because they're so intertwined, but it's essential to maintain the integrity of analysis by removing any overlap between it and argument.

Legal analysis has two parts: 1) breaking the case into into parts, and 2) relating these parts to the larger context of the law. (The "Analysis" section of an office memorandum)

Persuading - To convince your audience that your position is more reasonable than any other. It's essential to base your argument on logic, not on emotion, or you will be working against your purpose. (Persuasion in the "Argument" section of a brief)

The second major consideration for the legal writer is to determine exactly who the audience for each document will be. lawyers generally write for four specific audiences: clients, colleagues, opposing attorneys, and the courts. Each of these audiences requires a different approach to effectively communicate with them. I've included ten questions that might help lawyers become more aware of their audience and better able to find the right approach. First, look at the questions, then move on to consider the four general categories of legal writing audiences.

AUDIENCE ANALYSIS QUESTIONAIRE

1. Who is the primary audience?

2. If there is more than one audience for the document, will you need to concentrate on one at the expense of the other? Is there some common ground you can emphasize?

3. What is the audience's education level?

4. What knowledge of the law does the audience have?

5. If the audience is an attorney, what legal specialty does he or she have?

6. What history does this audience have with similar legal matters?

7. Are there any biases or prejudices present?

8. How many years of experience does the audience have?

9. Under what circumstances will the audience read the document?

10. Are there any external pressures that might influence how the audience will interpret the document?

Now that you've answered the questions to help you define your specific audience, take a few minutes to think about the general audience types. It's instructive to compare the portrait you have of your specific audience to the general category--often the comparison will point out things you haven't noticed or things that make your specific reader unique. The following are the general categories and what you need to think about when writing for them:

Client - What does the client need from your writing? First, he or she needs to understand how you are proceeding with the case and why. Second, the client needs to fee secure in your handling of the case. And third, the client does not want to be patronized. You have to adopt a tone that takes into consideration the answers to questions 3, 4, and 7 (What is the client's education level? Legal knowledge? History with similar legal matters?)

Opposing Attorneys - Usually the opposing attorneys are the secondary audeince for documents designed for the court or for the client. It's especially important to deal with the opposing viewpoint, but you should do so within a positive, not a negative framework. In other words, the best defense is a good offense. If your document proceeds primarily as a rebuttal of the opponent, both your primary audience (the court) and the opposing attorney will direct attention to that alternate perspective. Instead, include the opposition within your argument. Never feature the opponent's view first.

Judges and the Courts - The courts believe in two things: stare decisis (following precedent) and logic. All emotion should support these two concepts and allow the courts to follow these traditions.

As you have probably noted, a discussion of the rhetorical elements in regard to legal writing really means three things:

Audience + Purpose = Tone

Or to put it another way, you need to ask yourself before you start to write:

- What do I need this document to do?
- What does the audience need from this document?
- Does the document directly meet these two needs?

If lawyers would occasionally disentangle themselves from their prose to ask those three questions about the rhetorical situation, communication would occur more regularly. To exemplify what a difference the rhetorical situation makes in the organization and language you should choose, I've provided two sample factual accounts, the first from an office memorandum (therefore objective and to a friendly audience who needs information) and the second from a trial brief (persuasive tone and organization, and assuming an audience made up of both the judge and the opposing attorney). Note the major differences in tone . [See example]

This discussion is not meant to be prescriptive or formulaic in its attention to categorizing legal writing. Instead, its main argument is that "up front" attention to the rhetorical context for legal documents allows the lawyer or law student to communicate more to the point--and certainly more effectively.

EXAMPLES

1. The following two methods of stating the legal issues in Revere v. Wharton illustrate the difference in rhetorical situations. The first is from a a Legal Office Memorandum, the second is from a Trial Brief.

Issue Presented:

1. Under the 1974 Tenement Building and Multiple Premises Act, is Wharton, the landlord of One Traverso Street, liable to Revere, tenant's social guest, for personal injuries resulting from Wharton's failure to inspect, safeguard, or issue warnings concerning the open door, the renovations and the dangerous holein or accessible from first floor common areas?

2. Is the court likely to decide issues of common area liability as a matter of law at summary judgment or are there disputed facts or law/fact issues making summary judgment inappropriate?

Questions Presented:

1. Could a jury conclude that the defendant landlord gave William Revere reason to believe that the open doorway leading off of the first floor common foyer led to common areas available for his use as a prospective tenant and a tenant's lawful guest?

2. May defendant landlord be liable to William Revere for negligently permitting his foreseeable access from the first floor common foyer to the dangerous renovation area immediately beyond the open door?

3. Could a jury conclude that defendant landlord breached her duty to inspect the common foyer and the accessible renovation area during her three-hour attendance at a tenant's party or that she breached her duty to issue proper warnings to unsuspecting guests concerning the known ongoing dangerous renovations?

4. Could a jury conclude that defendant landlord had sufficient notice of the dangerous hole and sufficient opportunity to observe the open door to be charged with actual knowledge of these dangerous conditions?

Comment: Of special note here is the memo's lack of emotional overtones. In the "Issue Presented," the writer presents the legal questions in a straightforward fashion, with no attempt to color the reader's response. The trial brief, on the other hand, definitely leads the reader to a predetermined conclusion. By the phrasing of each question, the attorney has indicated the conclusions he advocates;

whether a jury "could conclude that..." leads the reader to the appropriate response of "yes, a jury could conclude...." Even the wording of the brief's questions connote the writer's opinion: "foreseeable access," "dangerous renovation area," "unsuspecting guests," and so on.

Contributing to the persuasive effect is the order in which the questions appear. They provide a step-by-step structure confirming Revere's victimhood. First, Wharton gave Revere reason to believe the open doorway led to common areas. Second, she was negligent in not seeing that the door was open. Third, she didn't warn the guests about the dangerous renovations; and fourth, she failed to inspect the premises and safeguard them, even though she had suffiecient time to do so. In the phrasing and the ordering of these questions, the writer has carefully focused the lens through which the reader views the case, providing all information, but placing favorable points in the foreground.

II. The next example consists of two fact patterns from the same two documents given above. Note the difference in tone between the office memo and the trial brief.

FACTS from Office Memorandum:

While attending a party on July 20, 1984, William Revere fell into an unguarded hole in a separate renovation area of a building owned by Jan Wharton. Revere has sued Wharton, alleging in part that she failed in her duty to safeguard the common areas.

On July 20, 1984, Jan Wharton, the owner and landlord of One Traverso Street, had three occupied residential households in a building which was undergoing further residential and commercial renovation. That evening both Wharton and Revere, a tenant's social guest, attended a party on the second floor of One Traverso Street. During the party, Revere overheard Wharton say to several party-goers that three apartments would soon be available and that the guests should "feel free to look around."

Located directly inside the street entrance, the first floor foyer was open for and used for buzzer-controlled access to the second and third floors which were the residential areas of the building. A normally locked plywood door at the right rear of the foyer was left ajar the night of the party. Beyond the plywood door was the commercial renovation area including a dangerous, unguarded

hole in the floor. The unlighted renovation area had stud walls and was clearly undergoing construction.

Wharton posted no warnings concerning the renovation area and allegedly failed to inspect the area or the open plywood door the night of the party. She denies direct knowledge of the hole's existence. However, she had generally prevented tenant's from using the renovation area, with one exception for a tenant moving a piano.

While allegedly looking for an apartment, Revere passed through the open foyer doorway into the darkened renovation area. Searching for a light switch, Revere passed through the stud wall and fell into the unguarded hole, sustaining serious personal injury.

FACTS from a Trial Brief:

On the evening of July 20, 1984, William Revere suffered serious personal injury in a fall into a dark unguarded hole on the first floor of One Traverso Street, an occupied multiple tenant unit apartment building owned and operated by defendant Jan Wharton. Mr. Revere was at One Traverso Street both to attend a housewarming party at a second floor tenant's apartment and to look at newly renovated apartments which were for rent. While looking for available apartments, fpllowing the landlord's express invitation, Mr. Revere went through an open door at the rear of the first floor common foyer, which he believed led to common passageways and other available apartments. Unknown to him, near the open door was a large unguarded and unlighted hole in the floor created during ongoing rencvations. Mr. Revere took several cautious steps in search of a light switch. Immediately beyond a partially finished wall, Mr. Revere fell into the unguarded hole and sustained disabling leg injuries.

Mr. Revere and other guests at the party were given permission by defendant landlord to "look around" at the recently renovated apartments. Although the landlord left three aprtment doors open to permit guests to inspect available apartments, and although she did not inspect the common areas of the building for dangerous conditions during her three-hour stay at the party. Specifically, the defendant did not check the first floor foyer to make sure that the dangerous renovation area was properly sealed off by a locked door.

Ms. Wharton had known for several weeks that the rotten floor boards would soon be removed from the renovation area. She also knew that the renovation area was unlighted and that no warnings were posted. Defendant landlord knew the renovation area was potentially dangerous to unsuspecting visitors such as Revere in that she had arranged for the plywood door to be secured with a lock. Nonetheless, Ms. Wharton did nothing to warn Mr. Revere or other party-goers about the dangerous ongoing renovations. Instead, she extended an open invitation to "look around"in the foreseeably dangerous building.

Comment

Obviously, the "Facts" section of the memo is straightforward, placing all the facts in order and giving equal focus to events both favorable and unfavorable to Revere. But the "Facts" section in the brief provides a built-in opportunity to color the reader's perspective on the case. Placing the facts right after the Questions Presented (as is common in Trial Briefs) encourages the reader to use the description as a persuasive reflection on the problems. In the legal memorandum, the facts usually appear after the summary/short answer, not directly after the issue statements. In this trial brief, the attorney has used connotative language to create both an intellectual and emotional response favorable to his client. The differences between the objective language of the memo and the persuasive wording of the brief are especially clear in the subtle--but effective--changes the writer makes in presenting these facts:

Revere attends a "housewarming" party; he is not merely a tenant's social guest. In the brief, he takes "several cautious steps" in search of a light switch, instead of simply searching for the switch. Rather than passing through a "stud wall," Revere now goes through a "partially finished wall" and falls into a "large, unguarded, and unlighted hole." The connotations of this phrasing suggest Revere behaved reasonably while being victimized by Wharton's negligence. The repetition of the verb "know" in the final paragraph of the brief's facts section reinforces Wharton's shirking of her duty. She "had known" about the rotten floor boards; she "knew" the area was unlighted; and she "knew" it was potentially dangerous. This stacking of the verb makes the final two sentences even more dynamic--although she "knew so much, nonetheless she did nothing to warn....Instead, she extended an open invitation to disaster.